

DISCLAIMER

This electronic version of an SCC order is for informational purposes only and is not an official document of the Commission. An official copy may be obtained from the [Clerk of the Commission, Document Control Center](#).

COMMONWEALTH OF VIRGINIA

STATE CORPORATION COMMISSION

AT RICHMOND, FEBRUARY 25, 2000

APPLICATION OF

RAPPAHANNOCK ELECTRIC COOPERATIVE

CASE NO. PUE000088

For approval of an Electricity
Retail Access Pilot Program

PROTECTIVE ORDER

On February 8, 2000, Rappahannock Electric Cooperative ("Rappahannock" or "the Cooperative") filed with the State Corporation Commission ("Commission") public and confidential versions of an application for approval of a pilot program for retail access for electricity under §§ 56-234 and -577 C of the Code of Virginia. Rappahannock also filed rate schedules, terms and conditions, and other tariff revisions, together with supporting testimony and other information with its application. Among other things, the Cooperative stated in its application that it could implement its pilot program approximately 150 days after it receives the necessary regulatory approvals and that it seeks to implement its plan in coordination with the implementation of the Virginia Electric and Power Company and American Electric Power-Virginia pilot programs.

A Motion for a Protective Order accompanied Rappahannock's application. In its Motion, Rappahannock maintained that

certain information presented by witness James M. Drzemiecki and witness Jack D. Gaines discussed proprietary, commercially sensitive market projections that should be subject to a protective order. It requested that the Commission consider entering an order protecting this information as well as other proprietary information provided in response to future discovery requests. The Cooperative attached the June 29, 1999, Hearing Examiner's Ruling entered in Case No. PUE980813¹ as an example of a ruling that would provide the protection Rappahannock seeks.

After reviewing the Company's request, we are of the opinion and find that this matter should be docketed and that a protective order setting forth the procedures by which confidential information can be handled generally in this proceeding should be entered.

At present, the only identifiable participant in the case is the Commission's Staff. The Staff is not a competitor or customer of Rappahannock. In the performance of their regulatory duties, Staff members are not permitted to divulge personal or proprietary information except as required by statute or court order. Therefore, the disclosure of

¹ Commonwealth of Virginia, At the relation of the State Corporation Commission, Ex Parte: In the matter of considering an electricity retail access pilot program--Virginia Electric and Power Company, Case No. PUE980813 (June 29, 1999, Hearing Examiner's Ruling).

commercially sensitive information to the Staff who are subject to the terms of this Protective Order should not be an issue.

On the other hand if a competitor or customer of Rappahannock requests access to commercially sensitive confidential information, the question arises whether they should be granted access to that information. In civil litigation, there are almost no trade secrets or proprietary information that may be excluded from discovery.² Under the appropriate circumstances, everything but privileged information is discoverable. The question for the trier-of-fact is whether those circumstances exist. In the context of this proceeding, the question has not arisen since no competitor or customer of Rappahannock has filed a notice of appearance as a party to this proceeding. In the event the question does arise, Paragraph (2)(e) of this Protective Order addresses the disclosure of commercially or competitively sensitive information and permits the Cooperative to request additional relief from the Commission or any Hearing Examiner assigned to this matter.

Accordingly, IT IS ORDERED THAT:

(1) This matter is hereby docketed and assigned Case No. PUE000088.

² See, Coca-Cola Bottling Co. v. Coca-Cola Co., 107 F.R.D. 288, 290 (D. Del. 1985) ("Except for a few privileged matters, nothing is sacred in civil litigation; even the legendary barriers erected by The Coca-Cola Company to keep its formulae from the world must fall if the formulas are needed to allow plaintiffs and the Court to determine the truth in these disputes.")

(2) Any documents, materials, and information to be produced by Rappahannock, including the redacted portions of its application and attached documents (the "application") or to be produced by a case participant other than Staff ("other party") in this proceeding in response to Commission Orders, Hearing Examiner Rulings, Commission Staff ("Staff") data requests, or properly propounded interrogatories or requests for production of documents from Staff or other parties in the proceeding, which documents, materials, or information the producing party designates as confidential ("confidential information"), which designation may include competitively or commercially sensitive information, shall be produced, examined, and used only in accordance with the following conditions:

- (a) The Clerk of the Commission is directed to maintain under seal all documents, materials, and information filed with the Commission in this proceeding which the producing party has designated, in whole or in part, as confidential information. Other parties seeking access to these documents shall execute an Agreement to Adhere to the Protective Ruling ("Agreement"), which is Attachment A to this Order, before access to these and other confidential documents may be granted and shall be bound by the terms of

this Order regarding the introduction of such documents.

- (b) All confidential information produced to Rappahannock, the Staff, or other parties shall be used solely for purposes of this proceeding, including any appeals.
- (c) Access to confidential information shall be specifically limited to Rappahannock, the Staff, or other parties, their counsel and expert witnesses, and to support personnel who are working on this case under the direction of their counsel and to whom it is necessary that the confidential information be shown for the purposes of this proceeding. The Staff witnesses and their attorneys are hereby directed to treat all confidential information received in connection with this case as set forth in this Protective Order. In order to obtain access to such information, Rappahannock and all other parties, their counsel and expert witnesses shall sign the Agreement, which is Attachment A to this Order. Staff counsel and Staff witnesses, including consultants to Staff, are not required to sign the Agreement. All Agreements shall be

promptly forwarded to the producing party upon execution, and the producing party shall provide a list of those persons entitled to access to confidential information to the Clerk of the Commission and all counsel of record. The producing party shall update the list of persons entitled to access to confidential information as necessary.

- (d) In the event that Rappahannock, the Staff, or other parties seek permission to grant access to any confidential information to any person other than the persons authorized to receive such information under paragraph (c) above, those desiring permission shall seek the consent of counsel for the producing party. The producing party shall be under no obligation to furnish the confidential information to persons other than those described in paragraph (c) above unless specifically ordered by the Commission or the Hearing Examiner assigned to this case to do. Rappahannock, Staff, or other parties are encouraged to seek stipulations regarding the granting of access to the maximum extent practicable. In the event of a negative

response, the party seeking disclosure may apply for permission to the Commission or to the Hearing Examiner assigned hereto by the Commission for permission to grant such access.

- (e) In the event Rappahannock or other parties contend that they should not be required to produce to parties other than the Staff specific documents, materials, or information due to their commercially or competitively sensitive nature, or that access to competitively sensitive information should be restricted, Rappahannock or such other party shall bear the burden of proving that such specific documents, materials, or information should not be discoverable, or access should be restricted, by appropriate motion directed to the Commission or to the Hearing Examiner assigned to this matter.
- (f) In the event Rappahannock, the Staff, or other parties seek to introduce at a hearing, testimony, exhibits, or studies that disclose confidential information, the person seeking such introduction shall:

- (i) Notify the producing party as far in advance as possible of the filing with the Commission of prefiled testimony.
- (ii) Notify the producing party at least three (3) days in advance of any such hearing regarding testimony that is not prefiled unless a shorter period would not unduly prejudice the producing party.
- (iii) If such testimony is prefiled, file such portions of the application, testimony, exhibits, studies, or other documents with the Commission under seal and serve on all parties of record copies of the testimony, exhibits, studies, or other documents, deleting those parts that contain references to or portions of the designated confidential information. The portions of the application, testimony, exhibits, studies, or other documents containing the confidential information filed with the Commission shall be kept under seal unless and until the Commission or its Hearing Examiner assigned to this matter rules to the contrary. Each party, upon signing

Attachment A, and Staff shall receive a copy of those parts of the application, testimony, exhibits, studies, or other documents that contain references to or portions of the confidential information and each party, Staff, and counsel shall be bound by this Order insofar as it restricts the use of and granting of access to the confidential information.

- (g) Oral testimony regarding confidential information, if ruled admissible by the Commission or any Hearing Examiner assigned to this case, shall be taken in camera and in the presence of only those persons who have been granted access to the confidential information pursuant to this Order, and that portion of the transcript recording such testimony shall be placed in the record under seal.
- (h) No person authorized by this Order to have access to confidential information shall disseminate, communicate, or reveal such confidential information to any person not specifically authorized under this Order to have access thereto.

- (i) At the conclusion of this proceeding (including any appeals), any originals or reproductions of any confidential information produced pursuant to this Order shall be returned by Rappahannock and other parties to the producing party (or destroyed) if requested to do so by the producing party. At such time, any originals or reproductions of any confidential information in the Staff's possession shall be returned to the producing party, destroyed, or kept with the Staff's permanent work papers in a manner that will preserve the confidentiality of the documents, materials, or information. Insofar as the provisions of this Protective Order restrict the communication and use of the documents produced thereunder, such restrictions shall continue to be binding after the conclusion of this proceeding (including any appeals) as to the information contained within such documents.
- (j) This Protective Order does not preclude Rappahannock, the Staff, or any other party from arguing, prior to public disclosure, that documents, materials, or information received pursuant to this Order should not be treated as

confidential. But in no event shall Staff or any party disclose confidential information it has received subject to this Order absent a finding by the Commission or its Hearing Examiner that such information does not require confidential treatment. If Rappahannock, the Staff, or any other party desires to make such an assertion, the producing party shall be given reasonable notice before being required to bear the burden of proving the contrary, and reasonable notice shall be at least three (3) days in advance of a hearing in connection with prefiled testimony or testimony that is not prefiled with the Commission that contains information designated by the producing party as confidential. The burden of proving that documents, materials, or information require confidential treatment as trade secrets, commercially, or competitively sensitive information, or other grounds for confidential treatment shall be upon the person requesting that the documents, materials, or information be held in confidence.

- (k) If a producing party believes that any documents, materials, and information must be protected from

public disclosure due to its confidential nature,
that party shall:

- (i) Provide to the requesting person a description of the information being withheld and a complete explanation of the reasons that the information is being withheld. The producing party shall identify with specificity the information, documents, or portions thereof being withheld and shall provide a full explanation of the basis on which the producing party is withholding such information, documents, or portion thereof from disclosure. A copy of such explanation shall be provided to any party or Staff upon request.
- (ii) A producing party is obligated to separate non-confidential documents, materials, and information from confidential information wherever practicable, and to produce the non-confidential documents, materials, and information in a timely manner.

(iii) the producing party shall further comply
with the provisions of this Protective
Order.

(3) This matter is continued, pending further order of the
Commission.

ATTACHMENT A

APPLICATION OF

RAPPAHANNOCK ELECTRIC COOPERATIVE

CASE NO. PUE000088

For approval of an Electricity
Retail Access Pilot Program

AGREEMENT TO ADHERE TO
PROTECTIVE RULING

I, _____, on behalf of and representing
_____, hereby acknowledge having read and
understood the terms of the Protective Order entered in this
proceeding and agree to treat all confidential information that
I receive, review, or to which I have access in connection with
Case No. PUE000088, as set forth in that Protective Order.

Signature: _____

Printed Name: _____

On behalf of: _____

Date: _____